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No. 07-1028

In The
Supreme Court of the United States

PANORAMA, INC.,

Petitioner,

v.

ZOMBA ENTERPRISES, INC., et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

BRIEF IN OPPOSITION

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April 9, 2008

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QUESTIONS PRESENTED

Whether the Sixth Circuit correctly held that the Eighth Amendment Excessive-Fines Clause does not apply to the District Court's award of statutory damages in this civil lawsuit in which the government is not a party.

Whether the Sixth Circuit correctly held that the District Court's statutory-damages award did not violate Petitioner's Fifth Amendment due-process rights because they were not wholly disproportionate to the offense or obviously unreasonable.

Whether the Copyright Clause, U.S. Const. art. I, § 8, cl. 8, requires a copyright holder to license its musical compositions to karaoke manufacturers.

Whether the Sixth Circuit correctly held that Petitioner's sale of karaoke discs does not fall within the "teaching" section of the Copyright Act's fair-use provision because Petitioner itself does not use the discs to "teach" lyrics.

Whether the Sixth Circuit correctly refused to take judicial notice of untimely, unauthenticated and inadmissible Internet articles Petitioner moved to add to the appellate record after Respondents filed their response brief in the Sixth Circuit.

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STATEMENT OF THE CASE

Although Petitioner, Panorama, Inc. ("Panorama"), portrays this case as one of "great importance," it is nothing more than a classic case of willful copyright infringement. The most remarkable aspect of this case is Panorama's repeated, unapologetic and willful infringement of twenty-six different copyrighted works of Respondents, Zomba Enterprises, Inc. and Zomba Songs, Inc. (collectively, "Zomba"), in violation of a federal district court order.

Only after the fact did Panorama conjure the defense of fair use, a defense that is inapplicable to Panorama's commercial, non-transformative and wholesale copying of Zomba's works. In light of the egregious nature of Panorama's conduct, the District Court awarded appropriate statutory damages against Panorama for each of the twenty-six infringed works within the boundaries Congress set in enacting the U.S. Copyright Act.

Panorama paints itself as a "victim" and suggests the lower court decisions in this case will impede "the Progress of Science and useful Arts." It is infringing conduct such as Panorama's conduct, however, that threatens to chill the creation of art by depriving copyright holders of compensation for their efforts.

The Sixth Circuit correctly followed the precedent of this Court in affirming the District Court's decision and created no circuit split in the process. To the contrary, the Ninth Circuit — the circuit court Panorama claims has rendered decisions conflicting with the Sixth Circuit decision here — earlier this year

followed the Sixth Circuit's decision in this very case in Leadsinger, Inc. v. BMG Music Publishing, 512 F.3d 522 (9th Cir. 2008), another karaoke case involving Zomba.

This case involves nothing more than the fair and usual application of the Copyright Act to remedy a willful infringement of a most egregious nature. Therefore, Panorama's petition should be denied.

I. The Underlying Allegations

In 1998, Panorama began manufacturing and selling karaoke discs containing recordings of musical compositions. (R. 100, Damages Hearing Tr. at 27:4). Panorama released karaoke products in a "CD+G" ("compact disc plus graphics") format, which contains a recording of a musical composition with the option of viewing a graphic representation of the lyrics of that composition in synchronization with the music when played on a karaoke machine. (R. 28, Summary Judgment Memo. at 2).

Since 1998, Panorama has released monthly karaoke discs in four genres: pop, R&B, rock and country. (R. 100, Damages Hearing Tr. 26:24-25-27:27). Each disc includes nine to ten recordings of copyrighted musical compositions. (Id. at 33:19-24).

Panorama did not seek permission from any copyright holders before releasing the infringing products. Thus, Panorama has released discs infringing thousands of musical-composition copyrights. (Id. at 33:19-24). Panorama exploited ten of Zomba's copyrighted musical compositions in 1999

and 2000 without Zomba's permission. (R. 28, Summary Judgment Memo. at 2; R. 71, Panorama's Resp. to Req. for Adm. Nos. 2, 41, 59, 65, 72, 77, 110, 122, 137, 143).

In late 2000, Nashville attorney Linda Edell Howard notified Panorama that the company was selling products containing the copyrighted works of Without Anna Music, another publishing company, without permission. (R. 100, Damages Hearing Tr. at 8:8-20). Although Panorama agreed to license terms for those other musical compositions, Panorama failed to comply with those terms. (Id. at 12:18-25).

While negotiating licenses with Ms. Howard in 2000, Panorama hired the former head of licensing at The Harry Fox Agency, Vincent Castalucci, to advise the company about licensing requirements for exploitation of copyrighted works on karaoke products. (Id. at 37:11-18).[1] Mr. Castalucci advised Panorama that licenses were required for karaoke products. (Id. at 38:12-21). Nevertheless, Panorama continued to exploit Zomba's musical compositions and continued to release new products without obtaining or even requesting Zomba's permission. (Id. at 38:22-39:2, 55:7-19).

Ms. Howard, acting on behalf of Zomba, sent Panorama "cease and desist" letters on February 28, 2002, and April 12, 2002, respectively. In those letters, Zomba requested that Panorama provide proof

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[1] The Harry Fox Agency is a licensing agent for musical-composition copyrights. (R. 100, Damages Hearing Tr. at 11:8-11).

of any licenses or permission obtained before exploiting the copyrights identified in the letters, provide a full accounting of all past exploitations and refrain from selling the infringing products. Ms. Howard also advised Panorama that its continued unlawful exploitation could lead to a finding of willful copyright infringement. (Id. at Exs. 1 & 2). Panorama never provided proof of permission or accountings and continued to exploit Zomba's copyrighted works. (Id. at 11:12-12:3).

After receiving Ms. Howard's letters and being advised by Mr. Castalucci that licenses were required, Panorama concluded that the license fees Ms. Howard proposed "were so high that Panorama would not be able to remain competitive in the karaoke industry." (R. 31, Affidavit of Laurindo Santos ¶¶ 8-9). Panorama then looked for a way to avoid paying the copyright holders for permission to use the protected works. (Id. at ¶ 9).

Mr. Santos, a Panorama shareholder and officer, decided how Panorama would proceed: "What am I going to do? I will try to stay in business and let them keep coming as they come. I will just pay them as they approach." (R. 71, Depo. of Laurindo Santos 99:3-16).

II. Procedural Background and Panorama's Post-Complaint Willful Infringement

A. Proceedings in the District Court

Zomba filed its Verified Complaint on January 13, 2003, in the United States District Court for the Middle District of Tennessee ("District Court"),

alleging thirty counts of copyright infringement.[2] (R. 1, Ver. Compl.). Panorama continued to sell the infringing products after this suit was filed. (R. 100, Ex. 3 to Damages Hearing Tr.).

In April 2003, Panorama agreed to a District Court Order prohibiting the sale of infringing products. (R. 13, Order). Within ***four days*** of the entry of that Order, however, Panorama resumed the sale of infringing products:

> Q: And in fact your records, Panorama's records show that after the April 22, 2003 injunction was entered, the company continued to sell products four days later, April 26, 2003 containing compositions that are the subject of this lawsuit; isn't that correct, Mr. Santos?
>
> A: If the records show that, it's got to be.

(R. 100, Damages Hearing Tr. at 46:9-14).

In fact, Mr. Santos could not confirm that he ever told his colleagues at Panorama to stop selling the infringing products after the District Court entered its April 22, 2003, Order. (Id. at 44:23-45:5). Panorama never returned to the District Court to seek relief from that Order or to advise the District Court that sales of the infringing products had resumed. (Id. at 44:3-7).

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[2] Zomba subsequently dismissed four counts. (R. 69, Motion for Voluntary Dismissal).

Panorama raised its fair-use defense for the first time fourteen months into the litigation of this case. (Id. at 49:3-18).

The parties filed opposing summary judgment motions with the District Court. Panorama moved on the sole ground that its exploitation of Zomba's copyrighted works constituted fair use. (R. 27 & 28, Panorama's Summary Judgment Motion and Memo). On June 18, 2004, the District Court granted summary judgment in Zomba's favor on the issue of infringement and rejected Panorama's fair-use defense. (R. 61, Memorandum).

Panorama continued to sell unlicensed products after entry of summary judgment and as late as November 2005, including at least one product that contains one of the musical compositions at issue in this case. (R. 100, Damages Hearing Tr. at 33:25-34:2, 55:1-47). In fact, Panorama unapologetically continues to manufacture and sell products containing performances of musical compositions the company has no permission to exploit. (Id. at 58:18-21).

After Zomba asked the District Court to hold Panorama in contempt for violating the District Court's April 2003 Order (R. 39, Motion for Sanctions), Panorama's counsel moved to withdraw. (R. 51, Motion to Withdraw). Panorama was given time to find successor counsel, but no lawyer entered an appearance on the company's behalf before the deadline established by the Court. (R. 54 & 56, Orders). Despite the deadlines set forth in the Scheduling Order, Panorama refused to cooperate with Zomba's counsel in the preparation of a Joint Pretrial

Order. (R. 68, Order). The District Court entered a default against Panorama on the issue of damages. (R. 68, Order).

Days before the damages hearing, Panorama filed for Chapter 11 bankruptcy protection, and the case was stayed. (R. 75, Notice of Bankruptcy). The Bankruptcy Court subsequently lifted the stay. (R. 89, Notice of Filing).

On November 5, 2005, the District Court held the damages hearing. (R. 100, Damages Hearing Tr.). On December 5, 2005, the District Court issued findings of fact and conclusions of law, concluding that Panorama's infringement was willful and awarding Zomba $31,000 for each of the twenty-six infringements at issue, for a total of $806,000. (R. 107, Findings of Fact and Conclusions of Law). The District Court awarded attorneys' fees in the amount of $76,456.16 and costs in the amount of $1,058.91. (R. 122, Order).

Panorama appealed the District Court's decision to the United States Court of Appeals for the Sixth Circuit. (R. 127, Notice of Appeal).

B. The Sixth Circuit Opinion

On June 26, 2007, the Sixth Circuit affirmed the District Court's judgment in all respects.

The Sixth Circuit first affirmed the District Court's rejection of Panorama's fair-use defense. Analyzing the four fair-use factors, the Sixth Circuit held:

1. Panorama's use of the works is "only minimally, if at all, transformative" and is commercial in nature;

2. The subject infringed works — musical compositions — "'fall[] within the core of the copyright's protective purposes'";

3. Panorama copied the compositions in their entirety; and

4. "Panorama's unlicensed copying deprived Zomba of licensing revenues it otherwise would have received."

(Opinion, Apx. 11a-17a (citations omitted)).

The Sixth Circuit also affirmed the District Court's finding of willful infringement, relying on the fact that Panorama continued the infringing activity after the District Court entered a consent decree forbidding Panorama to do so. (Opinion, Apx. 17a-20a).

Finally, the Sixth Circuit affirmed the District Court's award of statutory damages in the amount of $31,000 per infringed work. The Sixth Circuit held that the award was not an "excessive fine" under the Eighth Amendment because the Excessive-Fines Clause does not apply to money damages in a civil suit. The Sixth Circuit also held that the award did not violate Panorama's right to due process because the award was not sufficiently oppressive to constitute a deprivation of due process. (Opinion, Apx. 20a-26a).

REASONS FOR DENYING THE WRIT

I. The Sixth Circuit — in a Decision Followed by the Ninth Circuit — Correctly Applied the Copyright Law and This Court's Precedent in Affirming the Decision of the District Court.

The Sixth Circuit correctly affirmed the District Court's conclusion that Panorama willfully infringed all twenty-six of the copyrights at issue. Panorama suggests the Sixth Circuit decision created a split with the Ninth Circuit, but the Ninth Circuit has since followed the Sixth Circuit's decision in another karaoke case. In rendering their decisions, both circuit courts applied the fair-use test set forth in the Copyright Act as applied by this Court in Campbell v. Acuff-Rose Music, 510 U.S. 569 (1994).

The Sixth Circuit also correctly affirmed the District Court's exercise of its broad discretion in awarding statutory damages within the range established by Congress in Section 504 of the Copyright Act. Panorama's willful infringement of twenty-six of Zomba's copyrighted works in flagrant violation of a District Court Order and full awareness of its licensing obligations justifies the statutory-damages award of $31,000 per infringed work, an award at the lower end of the available heightened statutory damages for willful infringement.

A. The Sixth Circuit Correctly Affirmed the District Court's Conclusion That a Fair-Use Defense Is Inapplicable to Karaoke Recordings.

Although failing to assert such defense in its Answer to the Complaint, Panorama claimed more than one year after the Complaint was filed that its infringement is permitted as "fair use" pursuant to Section 107 of the Copyright Act, 17 U.S.C. § 107.[3] (R. 100, Damages Hearing Tr. at 47:9-18). The Sixth Circuit accurately described Panorama's late reliance on the fair-use defense as nothing more than a "post hoc rationalization concocted to skirt liability." (Opinion, Apx. 18a, n.9).

Section 107 provides four non-exclusive factors to consider when evaluating whether a use is fair:

> 1. The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
>
> 2. The nature of the copyrighted work;

---

[3] For the first time on appeal, Panorama also raised the defenses of *de minimis* use, misuse of copyright, compulsory license and violation of the idea/expression dichotomy. The Sixth Circuit correctly refused to entertain those arguments, holding that Panorama failed to raise them in the District Court. (Opinion, Apx. 10a, n.6). Panorama suggests the defenses should have been part of the fair-use analysis regardless of Panorama's failure to raise them below. The waived defenses, however, are each unique defenses not encompassed within the four fair-use factors set forth in the Copyright Act. See 17 U.S.C. § 107.

> 3. The amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
>
> 4. The effect of the use upon the potential market for or value of the copyrighted work.

17 U.S.C. § 107.

These factors should not be "treated in isolation one from another. All are to be explored, and the results weighed together, in light of the purposes of copyright." Campbell, 510 U.S. at 578.

Panorama calls on this Court to use this case as a vehicle to refine the doctrine of fair use. This case is not the appropriate vehicle to do so, for this case is not even close. Even if Panorama had believed at the time that its use of Zomba's works was fair, such belief, as the Sixth Circuit held, was objectively unreasonable because Panorama had entered into a consent decree to cease its infringing conduct. (Opinion, Apx. 19a). Moreover, Panorama's wholesale misappropriation of the entirety of Zomba's compositions for purely commercial use weights all four fair-use factors heavily in Zomba's favor.

The Sixth Circuit did not, as Panorama asserts, give "dispositive weight" to the commercial nature of Panorama's use of the infringed compositions. (See Petition at 16). Instead, the Sixth Circuit correctly affirmed the District Court's conclusion that ***none*** of the four factors supports a finding of fair use.

1. **Panorama's Use of the Compositions Is Purely Commercial and Thus Presumptively Unfair.**

   a. The Sixth Circuit Followed *Campbell* in Determining That Panorama's Use Is Not Transformative or Commercial.

The first fair-use factor is "the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes." 17 U.S.C. § 107(1). The Sixth Circuit applied this Court's description of the first fair-use factor in Campbell, 510 U.S. at 579:

> The central purpose of this investigation [into purpose and character of use] is to see...whether the new work merely "supersede[s] the objects" of the original creation, or instead ***adds something new***, with a further purpose or different character, altering the first with new expression, meaning, or message; it asks, in other words, whether and to what extent the new work is "transformative."

(Opinion, Apx. 12a (quoting Campbell, 510 U.S. at 579) (emphasis added)). "'[T]he more transformative the new work, the less will be the significance of other factors, like commercialism, that may weigh against a finding of fair use.'" Id.

Applying this standard, the Sixth Circuit determined that "Panorama's use of the compositions is only minimally, if at all, transformative." Id. The

Sixth Circuit noted Panorama's admission that the hired musicians did not "change the words or music." Id.

In fact, not only did Panorama not change the words or music, it aimed to create a copy as close to the original compositions as possible:

> Q: What instructions do you give the recording studio about the number of musicians or vocalists to use?
>
> A: None. Just make it a rendition of the track, and we wanted a good reproduction, a good version.
>
> Q: What do you mean by a — what constitutes a good version in your mind?
>
> A: Something that's recognizable if you — ***close to the original***.

(R. 71, Depo. of Laurindo Santos at 14:8-16 (emphasis added)).

Panorama argued for the first time to the Sixth Circuit that Panorama "transformed" the original compositions because its use of the compositions is specifically designed to teach the listeners to sing those songs, thus serving a different purpose than the original.

The Sixth Circuit correctly rejected this argument, distinguishing a karaoke use from the parody use that this Court concluded was fair in Campbell: "Unlike a

parody, a facsimile recording of a copyrighted composition adds nothing new to the original and accordingly has virtually no transformative value." (Opinion, Apx. 12a (emphasis added)). The Sixth Circuit found:

> Panorama's own description of karaoke further undermines its assertion regarding "teaching": "Karaoke is primarily thought of as a form of *entertainment* that allows anyone to grab a microphone, hop on stage, and live out their [sic] fantasies of performing as famous music stars.'"

(Opinion, Apx. 13a (quoting R. 208, Memo. in Supp. Def.'s Mot. for Summ. J. at 3) (emphasis in Sixth Circuit Opinion)). The Sixth Circuit also determined that the record lacked any evidence that Panorama's products are used for teaching. (Opinion, Apx. 13a).

Panorama argues that ***its*** use is fair because ***a purchaser*** of its products may use the recording for teaching purposes. Panorama offered no evidence and does not argue that ***it*** uses the recordings to teach anything to anyone. The Sixth Circuit correctly held that the end-user's use of the work is "largely irrelevant; instead, the focus is on whether [the] ***alleged infringer's use*** is transformative and/or commercial." (Opinion, Apx. 13a) (emphasis added).

The Sixth Circuit compared Panorama's conduct to that of the plaintiff in Princeton Univ. Press v. Mich. Doc. Servs., Inc., 99 F.3d 1381, 1385 (6th Cir. 1996) (en banc), cert. denied, 520 U.S. 1156 (1997). In Princeton Univ. Press, the Sixth Circuit rejected the fair-use

defense of a copy shop that copied books and sold the copies to students in "coursepacks," holding that the challenged use was that of the copy shop, not the students. Id. at 1386.

> [T]he use of the materials by the students is not the use that the publishers are challenging. What the publishers are challenging is the duplication of copyrighted materials for sale by a for-profit corporation that has decided to maximize its profits — and give itself a competitive edge over other copyshops — by declining to pay the royalties requested by the holders of the copyrights.

Id.

"Quite similarly," the Sixth Circuit held in the instant case, "Zomba does not challenge karaoke crooners' renditions (atrocious or otherwise) of the relevant compositions, but rather Panorama's decision to copy these songs onto CD+Gs and then distribute them without paying royalties." (Opinion, Apx. 14a).

The Sixth Circuit's analysis was correct. How a purchaser or user chooses to use the karaoke products is irrelevant. Panorama's unauthorized exploitation of the subject compositions for commercial gain is the only relevant conduct.

The Sixth Circuit's conclusion is corroborated by the decision of an Indiana district court in another karaoke case, Morganactive Songs v. K&M Fox, Inc., 77 U.S.P.Q.2d 1064 (S.D. Ind. 2005). The defendant in Morganactive argued that karaoke constitutes parody

and should be afforded a fair-use defense because of the use of bar patrons. The court rejected this argument, concluding:

> It is not the original work that is being criticized, rather it is the glory seeker who has usually been inspired by liquid courage to provide the vocals to an otherwise unchanged musical backdrop. This is not parody, but solely imitation. Nothing "new" has been created, which the Supreme Court found to be an important characteristic at the heart of fair use.

Id. at 1068 (citations omitted).

Finally, the Sixth Circuit correctly concluded that Panorama's copying of Zomba's compositions to sell for karaoke use is commercial in nature. (Opinion, Apx. 14a). This Court has held that purely commercial use is presumptively unfair. See Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417, 448 (1984).[4]

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[4] Panorama argues that the lower courts erred by placing on Panorama the burden of proof as to this factor, asserting that this Court's holding in Campbell, 510 U.S. at 584, that commerciality is only one factor in the fair-use analysis contradicts this Court's holding in Sony Corp. of Am., 464 U.S. at 451. This Court in Campbell, however, ***affirmed*** its position in Sony, holding: "No 'presumption' or inference of market harm that might find support in Sony is applicable to a case involving something beyond ***mere duplication*** for commercial purposes." 510 U.S. at 591 (emphasis added). Put another way, if the copied work is "mere duplication" made for the infringer's commercial purpose, the court should presume market interference.

Accordingly, Panorama's use of Zomba's works is presumptively unfair under the first fair-use factor.

b. The Ninth Circuit Followed the Sixth Circuit's Decision.

Panorama argues that the Sixth Circuit created a split with the Ninth Circuit by establishing a "rigid rule" that analyzes fair-use claims "in a vacuum, rather than in the context of its effect on individuals and society . . . ." (Petition at 22). Not only are the Ninth Circuit cases on which Panorama relies distinguishable from the instant case, the Ninth Circuit recently followed the Sixth Circuit's decision here in another karaoke case.

The Ninth Circuit in Perfect 10, Inc. v. Amazon.com, Inc., 487 F.3d 701 (9th Cir. 2007), and Kelly v. Arriba Soft Corp., 336 F.3d 811 (9th Cir. 2003), applied the Copyright Act fair-use factors, as this Court instructed in Campbell, to the facts of each specific case. Those cases do not address karaoke but instead the use of copyrighted images as "thumbnail" images for purposes of an Internet search engine. The Ninth Circuit held in both cases that the uses were fair primarily based on the transformative nature of the uses, which served the different function of improving access to information on the Internet versus artistic expression. See Perfect 10, Inc., 487 F.3d at 721; Kelly, 336 F.3d at 819. The Ninth Circuit also concluded that the search engine's uses of the images did not harm the photographer's market for the images.

This case, when evaluated on its unique facts, as Campbell requires, is distinguishable from the "thumbnail" cases. Panorama's uses were not transformative, as discussed above. Moreover, as discussed below in Section I.A.4., unlike in the "thumbnail" cases, Panorama's use harmed Zomba's market for its compositions.

Any doubt as to whether the Sixth Circuit's decision here created a split with the Ninth Circuit is eliminated by the recent Ninth Circuit decision in Leadsinger, Inc., 512 F.3d at 522. In Leadsinger, Inc., a declaratory judgment action filed against Zomba, among others, the Ninth Circuit followed the Sixth Circuit's decision here and rejected a karaoke manufacturer's fair-use defense.[5] The Ninth Circuit

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[5] The Ninth Circuit in Leadsinger, Inc. also criticized EMI Entm't World, Inc. v. Priddis Music, Inc., 505 F. Supp. 2d 1217, 1221-22 (D. Utah 2007), the only decision to hold that a karaoke device is not an audiovisual work and that synchronization licenses are not necessary to sell a product that displays lyrics in timed relation with music. The Ninth Circuit held that the court in EMI Entm't World failed to consider the use of song lyrics in context:

> The images of song lyrics for the purpose of karaoke differ from song lyrics printed on a sheet of paper. Song lyrics printed on paper are not a series of images, have no relationship to a machine, and are not capable of indicating to the consumer when the lyrics are to be sung. On the other hand, images of song lyrics embedded in a karaoke device are part of a series of images, and must be shown by a machine so that the consumer knows when to sing each lyric.

Leadsinger, Inc., 512 F.3d at 528, n.2.

held that all four fair-use factors weighed against a finding of fair use. Id. at 530-31. The Ninth Circuit rejected Leadsinger's argument that karaoke teaches singing, because "it is not reasonable to infer that teaching is actually the purpose of Leadsinger's use of the copyrighted lyrics." Id. at 530.

The two circuit courts to have considered the issue both agree that unlicensed karaoke use of third-party compositions is not fair. Both circuits' decisions are consistent with that of the decision in ABKCO Music, Inc. v. Stellar Records, Inc., 96 F.3d 60, 64-66 (2d Cir. 1996), in which the Second Circuit held that song lyrics as used in karaoke enjoy independent copyright protection as literary works and that compulsory licenses under 17 U.S.C. § 115 do not give the defendants the right to publish the lyrics of the composition on a screen.[6] Accordingly, no circuit conflict exists that warrants resolution by this Court.

2. The Subject Musical Compositions "Fall within the Core of the Copyright's Protective Purposes."

The next fair-use factor is "the nature of the copyrighted work." 17 U.S.C. § 107(2). "This factor calls for recognition that some works are closer to the

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[6] Panorama argues that this Court should grant Panorama's Petition because the karaoke industry needs a decision affirming or overruling ABKCO Music, Inc. The Ninth Circuit's decision in Leadsinger, Inc. following the Sixth Circuit decision in this case answers any questions unequivocally: Members of the karaoke industry need a license from the owners of the compositions to use the compositions lawfully.

core of intended copyright protection than others, with the consequence that fair use is more difficult to establish when the former works are copied." Campbell, 510 U.S. at 586.

The Sixth Circuit held that, "like the musical composition in Campbell (Roy Orbison's 'Oh, Pretty Woman'), the compositions of pop songs here 'fall[] within the core of the copyright's protective purposes.'" (Opinion, Apx. 14a (quoting Campbell, 510 U.S. at 586)). Panorama does not appear to challenge this holding.

3. Panorama Admits It Used the Infringed Compositions in Their Entirety.

The third fair-use factor is "the amount and substantiality of the portion used in relation to the copyrighted work as a whole." 17 U.S.C. § 107(3). The Sixth Circuit correctly affirmed the District Court's conclusion that this factor weighs against fair use. Panorama admits copying each of the subject compositions in its entirety. (R. 71, Depo. of Laurindo Santos at 14:8-16).

The lower courts both correctly found that this factor clearly weighs against a finding of fair use. See, e.g., Princeton Univ. Press, 99 F.3d at 1389 (citation omitted) (finding use of 5 to 30% of a copyrighted work to be enough to weigh against a finding of fair use); see also Infinity Broad. Corp. v. Kirkwood, 150 F.3d 104, 109 (2d Cir. 1998) (noting that "generally, it may not constitute a fair use if the entire work is reproduced.") (citation omitted).

4. Panorama's Infringement "Deprived Zomba of Licensing Revenues It Otherwise Would Have Received."

The fourth fair-use factor is "the effect of the use upon the potential market for or value of the copyrighted work." 17 U.S.C. § 107(4).

The Sixth Circuit correctly affirmed the District Court's placing the burden of proof on Panorama as to this factor because the challenged use is commercial in nature. (Opinion, Apx. 15a). See Sony Corp. of Am., 464 U.S. at 451.

In support of the "market-harm" test, Panorama argued below that, because karaoke use is transformative, "it is less likely that it negatively affects the market for the original." As explained above, the Sixth Circuit correctly concluded that Panorama's copies are not transformative; they are simply copies.

Panorama also argued below that "Zomba and Panorama do not operate in the same market," but failed to cite any evidence supporting this claim. Indeed, the evidence is to the contrary, and the Sixth Circuit thus correctly rejected Panorama's claim as factually inaccurate:

> [T]he record illustrates that Zomba has previously licensed (and continues to license) its musical compositions to purveyors of karaoke products. It follows, then, that market harm is a given, as Panorama's unlicensed copying deprived Zomba of licensing revenues it

> otherwise would have received. Further, there can be no doubt that Panorama's practices, if they became widespread throughout the karaoke industry, would have a deleterious effect on the potential market for licenses to Zomba's songs.

(Opinion, Apx. 16a).

"To negate fair use, one need only show that if the challenged use 'should become widespread, it would adversely affect the potential market for the copyrighted work.'" Harper & Row Publishers, Inc. v. Nation Enters., 471 U.S. 539 (1985) (quoting Sony Corp. of Am., 464 U.S. at 451). As a music publishing company, Zomba is in the business of licensing its works for profit. (R. 47, Declaration of Mariola Kalinska, ¶ 2). Any unauthorized use of those works affects the potential market for the copyrighted musical compositions.

Moreover, Zomba licenses its musical compositions for karaoke use and has done so since 1992. (Id. at ¶ 2 & Ex. A). Zomba has licensed more than one thousand musical compositions for karaoke use. (Id. at ¶ 3). Those licenses result in Zomba receiving royalties for each product sold embodying a Zomba composition. (Id. at ¶ 4).

The Sixth Circuit has held that this exact scenario "negates" a finding of fair use. Princeton Univ. Press, 99 F.3d at 1388 ("the selling of permission to reproduce portions of the works . . . and the likelihood that publishers will license such reproduction is a demonstrated fact," thus "the potential for destruction

of this market by widespread circumvention of the plaintiffs' permission fee system is enough . . . 'to negate fair use.'").

Panorama also implied below that its use will increase the value of Zomba's copyrights by creating an interest in the original recordings. One district court rejected that very argument:

> Any allegedly positive impact of defendant's activities on plaintiffs' prior market in no way frees defendant to usurp a further market that directly derives from reproduction of the plaintiffs' copyrighted works. This would be so even if the copyrightholder had not yet entered the new market in issue, for a copyrightholder's "exclusive" rights, derived from the Constitution and the Copyright Act, include the right, within broad limits, to curb the development of such a derivative market by refusing to license a copyrighted work or by doing so only on terms the copyright owner finds acceptable. Here, moreover, plaintiffs have adduced substantial evidence that they have in fact taken steps to enter that market by entering into various licensing agreements.

UMG Recordings v. MP3.com, Inc., 92 F. Supp. 2d 349, 352 (S.D.N.Y. 2000) (citations omitted).

The Sixth Circuit agreed, explaining:

> While this argument might make sense if the copyrights at issue were copyrights of sound recordings, that is not the case, and Panorama

> offers no evidence that unlicensed copying of Zomba's musical compositions spurs demand for additional licensing, or even any logical reason why it could.

(Opinion, Apx. 16a, n.8).

Because the Sixth Circuit correctly found that all four fair-use factors weigh against Panorama, the Sixth Circuit was correct in affirming the District Court's decision that Panorama's use of Zomba's compositions was not fair. The Sixth Circuit's decision has been followed by the Ninth Circuit and is consistent with an earlier decision of the Second Circuit. Therefore, the lower courts' rejection of Panorama's fair-use defense does not warrant review.

5. Panorama's Defenses of Compulsory License and *De Minimis* Use Were Not Only Waived but Are Inapplicable.

Panorama asserted for the first time on appeal that the compulsory mechanical-licensing scheme in Section 115 of the Copyright Act should apply to karaoke licenses and that, therefore, Panorama's use of the lyrics is *de minimis*. The Sixth Circuit correctly refused to consider either defense because Panorama waived them by failing to assert them in the District Court. (Opinion, Apx. 10a, n.6).

In any event, Panorama's arguments fail. First, Section 115, which subjects phonorecords to a compulsory-licensing scheme, does not apply to audiovisual works such as karaoke devices. Leadsinger, Inc., 512 F.3d at 526 (citing 17 U.S.C.

§§ 101 and 115); see also ABKCO Music, Inc., 96 F.3d at 63, n.4. Section 115 does not entitle karaoke manufacturers to a compulsory license to display song lyrics in real time with sound recordings. Leadsinger, Inc., 512 F.3d at 527-28.

Second, a *de minimis* analysis focuses on the amount of the original work that is included in the copy at issue. Gordon v. Nextel Communs., 345 F.3d 922, 924 (6th Cir. 2003). Panorama admitted that its products contain the entirety of the copyrighted work. (R. 28, Summary Judgment Memo. at 16).

Finally, even if karaoke use only required a compulsory license — which it does not, as discussed above — Panorama never sought compulsory licenses for permission to exploit the twenty-six copyrighted musical compositions at issue. (R. 71, Depo. of Laurindo Santos 68:14-17).

B. The Sixth Circuit Correctly Applied This Court's Standard for Reviewing Statutory-Damages Awards.

The Sixth Circuit correctly affirmed the District Court's conclusion that Panorama's infringement was willful.[7] (Opinion, Apx. 17a). Panorama asked the

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[7] Panorama challenged the District Court's finding of willfulness in the Sixth Circuit appeal but has apparently abandoned that challenge in its Petition. The Sixth Circuit correctly concluded that Panorama exhibited a reckless disregard for Zomba's rights, and that, therefore, Panorama's reliance on its fair-use defense was objectively unreasonable. (Opinion, Apx. 19a). As the Sixth Circuit noted, Panorama continued its infringing activity after the

Sixth Circuit to reduce the District Court's statutory-damages award of $805,000 — or $31,000 for each of the twenty-six infringed copyrights — on grounds that the award is excessive and violates Panorama's constitutional rights. The Sixth Circuit correctly denied Panorama's request and affirmed the District Court's statutory-damages award.

Notably, the District Court did not award anywhere near the maximum amount it had the discretion to award under the Copyright Act — $150,000 — instead awarding $31,000 per infringed work, at the lower threshold of heightened statutory damages available for willful conduct. Further, the damages award was multiplied by twenty-six to equal $805,000 only because Panorama infringed not one, but twenty-six, of Zomba's compositions. Thus, once again, Panorama made its own proverbial bed, and Panorama's portrayal of itself as the victim is inaccurate.

District Court entered its consent order forbidding Panorama to do so. (Opinion, Apx. 19a). Panorama's disobedience of the consent order provides clear evidence of willful infringement. See Kepner-Tregoe, Inc. v. Vroom, 186 F.3d 283, 289 (2d Cir. 1999) (holding that defendant's continued infringement of software after plaintiff obtained injunction in separate litigation was the "antithesis of innocence" and "fully justified the district court's award of maximum statutory damages").

1. The Lower Courts Did Not State That Willful Infringement Damages Must Be at Least $30,000 per Infringed Copyright.

As a threshold matter, Panorama suggests that the lower courts required an award of at least $30,000 in statutory damages for each infringed copyright because the infringement was found to be willful. Panorama requests, therefore, that this Court clarify that a finding of willfulness does not require damages of at least $30,000 per infringement.

The Sixth Circuit made no such assumption and correctly determined that the District Court made no such assumption: "To the contrary, Panorama's willfulness prompted the district court to conclude that the maximum penalty for nonwillful infringement was not sufficient given Panorama's conduct." (Opinion, Apx. 21a). Therefore, the requested clarification is unnecessary.

2. The District Court Exercised Sound Discretion in Awarding Damages within the Range Established by Section 504.

The District Court's damages award falls well within the permissible range for willful infringement; thus, the District Court did not abuse its "broad discretion" in awarding $31,000 per infringement. See, e.g., The Walt Disney Co. v. Video 47, Inc., 972 F. Supp. 595, 603 (S.D. Fla. 1996) ("'An award of substantial damages, . . . is appropriate where the Defendant repeatedly violates copyright laws despite

actual knowledge of their licensing requirements.") (citations omitted).

Section 504 of the Copyright Act permits a plaintiff to elect to recover either the actual damages and infringer's profits or statutory damages. See 17 U.S.C. § 504. In this case, Zomba elected to recover statutory damages.[8]

The Copyright Act establishes a range of permissible damages of $750 to $30,000 for each infringed copyright. See 17 U.S.C. § 504(c). For willful infringement, a district court has the discretion to increase statutory damages to $150,000 per infringed copyright. Id. The range of statutory damages was established to "provide the courts with reasonable latitude to adjust recovery to the circumstances of the case." H.R. Rep. No. 94-1476, at 161 (1976).

"The sliding scale for [the amount of] statutory damages is designed in part to allow courts 'to increase the amount of the award in proportion to the number of individual infringements.'" Venegas-Hernandez v. Sonolux Records, 370 F.3d 183, 196 (1st Cir. 2004). Panorama infringed twenty-six of Zomba's copyrights. Zomba requested statutory damages of $150,000 for each infringed copyright. (R. 97, Pretrial Brief at 1). The District Court's award of $31,000 for each

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[8] Zomba's opportunity to elect statutory damages was particularly important here because the District Court concluded that it could not ascertain actual damages. (R. 107, Findings of Fact and Conclusions of Law ¶ 38).

infringed copyright was approximately one-fifth of the damages Zomba requested.

District courts have broad discretion in setting the amount of statutory damages within the damages range prescribed under the Copyright Act. Wildlife Internationale, Inc. v. Clements, 782 F.2d 1044, 1044 (6th Cir. 1985). "The broad discretionary power given courts to make such an award serves the dual purposes of the Copyright Act: to compensate copyright owners and to provide a deterrent for would-be infringers." National Football League v. Primetime 24 Joint Venture, 131 F. Supp. 2d 458, 473 (S.D.N.Y. 2001) (citations omitted).

As this Court has observed, "[e]ven for uninjurious and unprofitable invasions of copyright the court may, if it deems it just, impose a liability within statutory limits to sanction and vindicate the statutory policy." F. W. Woolworth Co. v. Contemporary Arts, Inc., 344 U.S. 228, 233 (1952). The availability of statutory damages prevents an infringer from benefiting from its wrongful conduct by facing a penalty of only actual damages. See Coleman v. Payne, 698 F. Supp. 704, 707 (W.D. Mich. 1988) ("[T]he defendant 'cannot expect to pay the same price in damages as it might have paid after freely negotiated bargaining, or there would be no reason scrupulously to obey the copyright law.'") (citation omitted).

Courts have exercised their broad discretion to award substantial statutory damages for willful infringement regardless of the "actual damages" at issue. See, e.g., National Football League, 131 F. Supp. 2d at 478-80 (awarding maximum statutory

damages for infringement that occurred after the court enjoined future infringements and placing "little weight on the [plaintiff's] actual damages or [the defendant's] profits in arriving at the appropriate statutory damage award."); The Design Tex Group, Inc. v. U.S. Vinyl Mfg. Corp., No. 04 Civ. 5002 (JSR), 2005 U.S. Dist. LEXIS 18276 (S.D.N.Y. Aug. 22, 2005), ** 2-6 (awarding maximum statutory damages of $150,000, 45 times defendants' profits, where defendants infringed another of the plaintiffs' copyrights after entry of agreed preliminary injunction, and "[t]he defendants' entire business plan seems to involve recklessly borrowing from others' copyrighted [works], allowing them to cheaply and quickly compete" in the marketplace).

Like the defendant in The Design Tex Group, Inc., Panorama's entire business model is premised on having the most popular songs recorded automatically and released quickly and cheaply without paying royalties to the copyright holders. (R. 71, Depo. of Laurindo Santos at 7:9-8:8). This case presents the paradigm for awarding substantial statutory damages under the Copyright Act. Panorama's repeated, continuing, unapologetic and willful infringement of Zomba's copyrights warrants imposition of substantial damages. Such an award furthers the policies underlying the statutory-damages provision of the Copyright Act.

3. The District Court's Damages Award Does Not Violate Panorama's Constitutional Rights.

a. The Sixth Circuit Correctly Held That the District Court's Damages Award Did Not Deprive Panorama of Due Process.

The Sixth Circuit correctly rejected Panorama's argument that the statutory-damages award is grossly excessive and disproportionate and thus violates Panorama's due process rights under the Fifth Amendment. (Opinion, Apx. 22a-26a).

Panorama's argument rests on the faulty premise that, for constitutional purposes, *statutory* damages stand on the same footing as *punitive* damages. The specific constitutional principles governing awards of punitive damages simply do not apply in the context of a carefully crafted scheme of *statutory* damages. The fundamental problem with Panorama's suggested analogy is that, unlike punitive damages — which are potentially unlimited and subject to the unbridled discretion of the jury — copyright statutory damages are strictly limited to specifically defined ranges that Congress established in the Copyright Act. See 17 U.S.C. § 504(c). Because these ranges are prescribed by statute, a jury has *no* discretion to award statutory damages in excess of these carefully circumscribed limits. This crucial difference renders wholly inapposite the constitutional case law that governs the imposition of punitive damages.

The particular set of constitutional rules that governs punitive damages is based *precisely* on the

concern that the award of such damages would otherwise rest on an "*unregulated and arbitrary* use of judicial power" that would violate due process. Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 20 (1991) (emphasis added). These concerns are inapplicable in the context of a system of statutorily prescribed fixed damages. Indeed, in light of the "safeguards in the legislative process," there is a "significant[] differen[ce]" — a constitutional difference — between "review of a jury's award for arbitrariness and *the review of legislation....*" TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443, 456 (1993) (emphasis added).

Despite this fundamental difference, Panorama nevertheless invites this Court to extend to this statutory-damages case the Court's standard for reviewing punitive damages set forth in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), and State Farm Mutual Automobile Ins. Co. v. Campbell, 538 U.S. 408 (2003).[9] But the underpinnings of Gore

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[9] Panorama also relies on this Court's recent decision in Philip Morris USA v. Williams, 127 S. Ct. 1057, 1060 (2007), where the Court held that a punitive-damages award cannot be based on the desire to punish the defendants for harming persons who are not before the court. The Sixth Circuit correctly found Williams inapplicable here because harm to third parties was not a factor in the District Court's decision. (Opinion, Apx. 26a, n.12). Panorama argues that to the extent the District Court cited deterrence as a basis for assessing its statutory-damages award, the award was at least partially on account of "strangers to the litigation" and thus prohibited by Williams. Deterrence of future misconduct is different than the past harm to third parties that this Court addressed in Williams. Panorama admits that the legislative history of the Copyright Act specifically lists deterrence

rested on concerns that have no application in the context of statutory damages.

The thrust of the due-process analysis in Gore was that "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive *fair notice* not only of the conduct that will subject him to punishment, but also *of the severity of the penalty* that a State may impose." Id. at 574 (emphasis added). Because statutory penalties provide parties with clear and ample notice of their potential liability, however, this centerpiece of the Gore analysis is simply irrelevant here. The plain language of Section 504 of the Copyright Act was on the books when Panorama decided to embark on its infringing activities. In fact, Panorama was provided with notice of potential damages for willful infringement twice in 2002 but continued its infringing conduct. (R. 100, Damages Hearing Tr. Exs. 1 & 2). Panorama was certainly provided "fair notice" of the dangers of continuing its infringing conduct.

Although inapposite, the factors identified in Gore only further serve to underscore their inapplicability to the issue of statutory damages. In Gore, the Court held that the disparity between a punitive-damages award and the "*civil penalties* authorized or imposed

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as one of the purposes of the statutory-damages provision. (Petition at 26 (quoting Staff of House Comm. on the Judiciary, 87th Cong., Report of the Register of Copyrights on the General Revision of the U.S. Copyright Law 103 (Comm. Print 1961), reprinted in 3 Omnibus Copyright Revision Legislative History (George S. Grossman ed., 1976)).

in comparable cases" is one of three key "guidepost[s]" for determining whether an award is excessive. 517 U.S. at 575 (emphasis added). Because "'substantial deference' [should be given] to legislative judgments concerning appropriate sanctions for the conduct at issue," the Court reasoned that a common-law punitive-damages award that happens to fall within the range of a statutory penalty for a similar wrong is unlikely to violate due process. Id. at 583. Thus, a punitive-damages award that *exceeds* such a range may still be permissible (depending on a consideration of the other Gore factors), but an award within such a range is presumptively constitutional. This analytical framework is obviously not intended to address the situation in which Congress has itself undertaken to prescribe the permissible ranges of damages. It makes no sense, for example, to ask the circular and tautological question whether a *statutory* damages amount is "greater" than the civil exactions specifically authorized by statute. Id. at 584 (identifying this as the third "guidepost").

The second Gore guidepost — *i.e.*, the disparity between the actual or potential harm suffered and the punitive-damage award — also demonstrates why importing punitive-damages case law into this context would make no sense. Id. at 575. Congress *expressly rejected* the notion that a statutory-damages award should bear some specified proportion to the "actual harm" suffered by the plaintiff when Congress gave copyright holders the statutory right to elect *either* "actual damages and any additional profits of the infringer" *or* "*instead* ... statutory damages." 17 U.S.C. § 504 (emphasis added). Congress gave plaintiffs this choice "precisely because of the

difficulties inherent in proving actual damages and profits." Yurman Design, Inc. v. PAJ, Inc., 93 F. Supp. 2d 449, 462 (S.D.N.Y. 2000), aff'd in relevant part, rev'd on other grounds, 262 F.3d 101 (2d Cir. 2001); see also Columbia Pictures Industries, Inc. v. Krypton Broad. of Birmingham, Inc., 259 F.3d 1186, 1194 (9th Cir. 2001) ("A plaintiff may elect statutory damages 'regardless of the adequacy of the evidence offered as to his actual damages and the amount of the defendant's profits'") (citation omitted). It is one thing to say, as the Court has said, that a common-law punitive damages award must bear some reasonable relationship to the harm suffered; it is quite another to say that Congress cannot undertake to impose a fixed range of damages awards, particularly in a context in which it has determined that proof of damages can be difficult to quantify.

Put simply, the Gore test was and is designed to address the validity of *otherwise unconstrained* common-law *punitive-damages* amounts awarded by juries; it was not intended, nor is it suited, for second-guessing the legislative judgments made by Congress itself. In fact, this Court has historically given broad deference to Congress in copyright cases. See, e.g., Eldred v. Ashcroft, 537 U.S. 186, 222 (2003) ("As we read the Framers' instruction, the Copyright Clause empowers Congress to determine the intellectual property regimes that, overall, in that body's judgment, will serve the ends of the Clause....The wisdom of Congress' action...is not within [this Court's] province to second guess."). This deference is important because Congress has already established the "reasonable" damages range for willful copyright infringement. Congress expressly stated that the

range of statutory damages was established to "provide the courts with ***reasonable*** latitude to adjust recovery to the circumstances of the case." H.R. Rep. No. 94-1476, at 161 (1976) (emphasis added). If a district court awards damages within the range set forth in Section 504, that award is presumptively reasonable because Congress has already stated that damages under Section 504 are "reasonable."

Notably, the Sixth Circuit did not, by refusing to apply the punitive-damages cases here, refuse to review the District Court's statutory-damages award entirely. The Sixth Circuit instead applied the standard this Court established for reviewing statutory-damages awards in St. Louis, I.M. & S. Ry. Co. v. Williams, 251 U.S. 63, 66-67 (1919). This Court held in Williams that, in such cases, the appropriate inquiry is whether the awards are "so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." Id. at 67. The Sixth Circuit explained that such review "is extraordinarily deferential — even more so than in cases applying abuse-of-discretion review." (Opinion, Apx. 24a (citing Douglas v. Cunningham, 294 U.S. 207, 210 (1935)).

The Sixth Circuit, observing that this Court in Williams affirmed a 113:1 ratio, concluded that the 44:1 ratio here "was not sufficiently oppressive to constitute a deprivation of due process" and is not unacceptable. (Opinion, Apx. 25a-26a). The Sixth Circuit's conclusion is fully consistent with the decisions of other courts. See Columbia Pictures Industries, Inc., 259 F.3d at 1195 (upholding $31.68 million statutory-damages award against individual

defendant for willful infringement of 404 copyrighted works, because it was "well within the statutory range for willful infringement"); Superior Form Builders, Inc. v. Dan Chase Taxidermy Supply Co., 74 F.3d 488, 496-97 (4th Cir. 1996) (refusing to overturn statutory-damages award that was 40 times greater than infringer's actual profit); UMG Recordings, Inc. v. MP3.Com, Inc., No. 00 CV 472 JSR, Copy. L. Rep. (CCH) P28141, 2000 U.S. Dist. LEXIS 13293, at ** 15-18 (S.D.N.Y. Sep. 6, 2000) ($118 million statutory-damages award against online music service warranted even though no actual damages proven).

In affirming the District Court's damages award, the Sixth Circuit did not look "for a comfortable formula," as Panorama alleges. (See Petition at 28). Instead, the Sixth Circuit considered the repeated, unapologetic manner in which Panorama infringed Zomba's copyrights. Such conduct warrants strong punishment and deterrence. Moreover, Panorama has been making substantial sums for the past eight years by exploiting unlawfully the rights of others. (R. 36, Ex. A, documents "Panorama 00006-0148"). After having heard all the evidence and gauging the credibility of the witnesses, the District Court did not abuse its discretion in awarding $31,000 for each infringed copyright.

b. The Sixth Circuit Correctly Found the Excessive-Fines Clause Inapplicable to This Civil Case.

Panorama argues — without citing any cases addressing statutory damages under the Copyright Act — that the award of damages here amounts to an

"excessive fine" and is thus prohibited by the Eighth Amendment to the Constitution.

The Sixth Circuit correctly rejected Panorama's argument based on this Court's decision in Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 264 (1989). (Opinion, Apx. 22a).

This Court in Browning-Ferris expressly rejected the application of Eighth Amendment principles to civil actions between private parties: "[The Eighth Amendment] does not constrain an award of money damages in a civil suit when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded." Id. at 264. Because the government will not receive a share of the damages awarded to Zomba, the Eighth Amendment analysis ends there. See also United States v. Bajakajian, 524 U.S. 321, 327 (1998) (the word "fine" in this context means a payment to the government).[10]

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[10] Panorama makes a lengthy policy argument that the Excessive Fines Clause should be extended to civil damages in copyright cases but cites no cases supporting its argument. (See Petition at 29-32). Panorama's argument that statutory copyright damages should be considered a payment to the government under the clause because copyrights go to the holder of a government-issued copyright is a leap in logic. In any event, this case, in which the remedy was appropriate in light of Panorama's egregious conduct, is an inappropriate vehicle to consider such extension. Panorama also argues that the Court should grant its Petition because "copyright holders are flooding the courts with statutory damages cases." (Petition at 32-33). The cases Panorama cites are inapposite to the facts in the instant case.

Panorama also suggests that the Sixth Circuit, by its holding, set an incorrect precedent that the Excessive-Fines Clause does not apply in civil cases. The Sixth Circuit did no such thing, instead invoking this Court's holding in Browning-Ferris that the clause "does not constrain an award of money damages in a civil suit ***when the government neither has prosecuted the action nor has any right to receive a share of the damages awarded.***" (Opinion, Apx. 22a (quoting Browning-Ferris, 492 U.S. at 264) (emphasis added)).

II. The Sixth Circuit Correctly Denied Panorama's Motion to Take Judicial Notice.

After Zomba filed its response brief in the Sixth Circuit, Panorama sought to admit into the record evidence supporting its defense of "misuse of copyright," a defense it asserted for the first time on appeal, such evidence including five unauthenticated Internet articles written after Zomba initiated this action and that relate to the merger of Zomba's parent corporation and documents related to other lawsuits filed by Zomba. (Panorama's Petition Appendix at 55a, 58a, 61a, 66a, 84a & 86a).

The Sixth Circuit correctly denied Panorama's Motion. The evidence existed during the District Court case but was not part of the District Court record and thus is not properly part of the appellate record. See Fed. R. App. P. 10(a). Further, the late-proffered evidence was not probative of any issues before the Sixth Circuit under Fed. R. Evid. 201(a). The articles relate to the merger creating Zomba's current parent company, Sony BMG. Respondents

Zomba Enterprises, Inc. and Zomba Songs, Inc. are separate legal entities and continue to own the copyrights at issue. (R. 83, Depo. of Wade Leak at 19).

Finally, the proffered evidence, Internet articles apparently offered to prove the statements made in those articles, is 1) inadmissible hearsay under Fed. R. Evid. 802 and 2) not authenticated as required under Fed. R. Evid. 901.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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